Supreme Court, U.S.

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

FRED PEEVY and RAYMOND L. BOLDEN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether the decision below is in conflict with the decision of the United States Court of Appeals for the Eleventh Circuit in *United States v. Thorn*, 17 F.3d 325 (11th Cir. 1994), or in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *United States v. Waechter*, 771 F.2d 974 (6th Cir. 1985).

B. Whether the admission of voluminous evidence concerning the handling of checks and a purported check kiting scheme required the giving of defendant Bolden's requested jury instructions in order to preserve the constitutional right of petitioners to substantive and procedural due process of law, and their constitutional right to a fair trial.

C. Whether the sentence imposed on petitioners was fatally flawed by the failure to find and utilize a rational monetary loss basis for sentencing purposes.

D. Whether the court of appeals so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the lower court, as to call for an exercise of this Court's power of supervision.

PARTIES TO THE PROCEEDING

The Petitioners are individuals, whose names are correctly listed in the caption.

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REFERENCE TO OPINIONS BELOW

There is no relevant opinion of the district court. The court of appeals affirmed the convictions and sentences of Petitioners without opinion and denied Petitioners' joint suggestion of rehearing without opinion. Copies of those orders are included in the appendix to this petition. App. 1-2.

STATEMENT OF JURISDICTION

The judgment and order of the court of appeals was entered on July 13, 1994. A timely petition for rehearing

was denied by that court on November 14, 1994. This Court's jurisdiction to review the judgment below is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AT ISSUE

The full texts of 18 U.S.C. §§ 2, 371, 656, 1005 and U.S.S.G. § 2F1.1 (with commentary) are reproduced in the appendix to this petition. App. 22-27.

STATEMENT OF THE CASE

A. Proceedings Below.

This petition arises out of a criminal prosecution conducted in the United States District Court for the Southern District of Alabama. That court had jurisdiction over this proceeding pursuant to 18 U.S.C. § 3231.

On January 12, 1993, a six-count indictment was returned in the United States District Court for the Southern District of Alabama naming as defendants the petitioners herein, Ray Bolden (hereinafter "Bolden") and Fred Peevy (hereinafter "Peevy"). Count One charged a conspiracy to violate Title 18, United States Code, Section 1005 (false entries in bank records) and a violation of Title 18, United States Code, Section 656 (misapplication of bank funds). Count Two charged Bolden and Peevy with a violation of Title 18, United States Code, Section 656 and Section 2 (misapplication of bank funds; aiding and abetting). Counts Three, Four, Five and Six charged Bolden and Peevy with a violation of Title 18, United

States Code, Section 1005 and Section 2 (false entries and material omissions; aiding and abetting).

The trial commenced on April 5, 1993. On April 22, 1993, the jury returned a verdict finding Bolden and Peevy guilty of counts One through Six of the indictment. The district court entered an order finding Bolden and Peevy guilty on April 22, 1993. On June 14, 1993, Bolden and Peevy filed a Notice of Appeal from the Judgment of Guilt.

On July 16, 1993, Bolden and Peevy were sentenced under the Sentencing Reform Act of 1984. The court found the offense level to be Level 22 and found a criminal history category of 1. The court then sentenced each defendant to prison for a period of 41 months, made a special assessment of $300.00 ($50.00 per count) and ordered restitution to United Bank of Atmore in the amount of $1,558,471.00 and to Preston Barnett in the amount of $568,000.00.

On July 16, 1993, Bolden and Peevy filed a Notice of Appeal from the district court's sentence. On July 16, 1993, Bolden filed an application with the district court for release pending appeal and on July 29, 1993, the district court entered an order denying that motion. Thereafter, both defendants timely surrendered to the United States Marshal and are presently in the custody of the United States Bureau of Prisons.

B. Statement of Facts.

This prosecution arose out of a cattle feeding program established in the early 1980's by William M. "Bill"

Brown in Atmore, Alabama. Investors would buy a pen of cattle for a certain price and Brown would feed the cattle until they were of a size appropriate to market. Brown would then sell the cattle to a processor and any profit, after subtracting the cost of feed, medication and other expenses, would be divided equally with the investor.

At the time of the prosecution, Bolden was president of United Bank of Atmore and Peevy was an agricultural lending officer. Brown's investors borrowed money from the bank and from other lending institutions to invest in Brown's cattle feeding program. The investor's loan was typically secured by the cattle purchased from Brown and other collateral.

In the late 1980's, Brown's operation suffered because of cattle deaths and crop failures. He attempted to keep the program afloat by lying to investors and falsifying records. Customers of United Bank, who earlier profited on their investments, became nervous. United Bank forgave and wrote off the loans of its customers who had invested with Brown and took back an assignment of the customer's rights in the cattle. Brown's empire crumbled and Brown and his son were convicted of federal mail and wire fraud charges.

In its indictment, the Grand Jury alleged that Bolden and Peevy conspired to make false entries and omissions in the bank's records in order to support Brown's failing business. Further, the Grand Jury alleged that Bolden and Peevy induced individuals to finance their investment in the program through United Bank at a time when they knew that the program was failing. At trial, the government argued that the defendants could be convicted of

violating 18 U.S.C. § 1005 (false entries in bank records) by the failure to place a letter threatening a law suit in a loan file.

Considerable of the testimony at the trial related to the handling of checks drawn on various Brown accounts, and particularly to determining which checks would be honored when the amount of the checks drawn exceeded the balance in the accounts at any particular time; likewise, the practice of allowing additional deposits to cover checks which had exceeded the current balance and the practice of returning checks where no covering deposits were made. (R. 3-206-250). The prosecution was allowed to present considerable testimony of what it considered to be a check kiting scheme in Brown accounts between the Lownes County Bank and the Atmore Bank, with most of this over defense objection. (R. 4-278-373). The admission of the evidence concerning the manner of handling these checks and the so-called check kiting scheme prompted the request for certain written jury instructions by Bolden, which were denied by the court and to which appropriate exception was taken. See App. 40-52.

The sentencing of Bolden and Peevy occurred on July 16, 1993 and the proceeding was replete with confusion. The sentencing hearing included a discussion about the amount of loss related to the offense. The court stated:

> " . . . Let me just state that while I presided over the trial and heard a lot of amounts thrown around, **I frankly can't tell you with any accuracy at all what losses there were** . . . I'm really at a loss there to determine what the actual losses were . . . In other words, whether there was an actual loss or not, the guidelines require

> that we look at the amounts involved . . . " (R.15-4,5)
>
> [Emphasis supplied]

The court stated that if the cattle loans had not been forgiven, the bank conceivably would have collected those loans. (R.15-9)

> "Because of what happened, these loans were written off. Now, I think that that certainly is money that we ought to consider as being involved in this case." (R.15-10)

The prosecution then listed each borrower of United Bank who invested in Brown's cattle feeding operation and from whom United Bank took an assignment of the customer's rights in the collateral and whose notes at the bank were written off. The court noted that all loans to cattle customers were forgiven by the bank, except for Preston Barnett. The court stated that because of pending civil litigation, it should not include the $805,000.00 relating to Preston Barnett. (R.15-22) The court found by a preponderance of evidence that there was at least a $1,500,000.00 loss involved but there was not as much as $2,500,000.00 involved.

Defense counsel objected to the court's findings and pointed out that the defendants had never been treated to the basis for these computations, instead defendant relied on the Probation Office's presentence investigation report ("PSI"). (R.15-24-25) The court said it is not going by the PSI and announced (for the first time) that it thinks that the bank was a victim of the crime. (R.15-25-26) Defense counsel argued that the decision by the bank to cancel the debt of the cattle customers and to take an assignment of

the collateral was not a Ray Bolden or a Fred Peevy decision. The defense argued that there was no loss to be attributed to these defendants from the bank's decision to take assignments of the customers' collateral and write off the loans. It was a decision made by the bank's board of directors for valid business reasons which were thoroughly explained in the testimony. (R.15-27) The court said:

> Now, what – you've raised something though that causes me some concern. We didn't talk about whether the bank realized – or salvaged anything on these individual loans. (R.15-27)

The defense argued that the cattle were not the only collateral given to the bank. (R.15-27,28) In addition, the "bank has the right to pursue that collateral" to those who improperly received it. (R.15-28) The court said that whatever the collateral was worth, it certainly wouldn't reduce the amount involved below $1.5 million. (R.15-29) The court stated: "**It's not going to make any difference.**" (R.15-35) [Emphasis supplied]. Defense counsel argued that the loss figure is not just academic. Further, the decision to cancel the debts was a business decision by the bank; therefore, the bank cannot be called a loss victim for the purposes of this criminal case. (R.15-33)

> THE COURT: "I don't follow that. If they had to write off some loans, sure it's a business decision to write it off, but it was a loss.
>
> MR. REDDEN: "They didn't have to write it off, if it please the court. That's the thing.
>
> THE COURT: "Well, I find by a preponderance of the evidence that they were caused to write it

> of by the activities of the defendants based upon the verdicts of the jury now." (R.15-33)

Regarding restitution, the court did not order restitution to most persons whose cases were in civil litigation. The court ordered restitution to the United Bank of Atmore in the amount of $1,558,471.00 to be paid jointly and severally by Bolden and Peevy. (R.15-41) This is the total amount of cattle loans that were paid off or forgiven by the bank. The court also ordered restitution to Preston Barnett in the amount of $568,000.00, which is to be reduced by the value of bank stock pledged for the loan in the event the stock is returned. (R.15-42) The Barnett case was in litigation at that time.

Defense counsel argued that earlier in the hearing, the court did not consider the loans of customers whose cases were being litigated and the court responded by saying:

> "I did that because I just don't have any idea what to put down at all. I mean, now, that's just depending on the lawsuit." (R.15-45) ". . . . the bank has made a decision in these other cases to go ahead and take the loss."

It is small wonder that the presiding judge of the panel of the court of appeals hearing oral argument noted that he could find no adequate or rational basis utilized by the district court in finding the dollar amount of loss for sentencing purposes.

A part of the instant petition relates to the conduct of the court of appeals in this case. At the commencement of the prosecution's oral argument, the presiding judge

directed that time would not be charged against the prosecutor while the presiding judge made certain statements. First, he expressed that he had strong doubt as to the sufficiency of the evidence to warrant convictions under Counts Two, Four and Five. Next, he expressed his belief that all of Bolden's requested jury instructions that were denied by the trial court should have been given. Finally, he made the statement referred to above concerning his failure to find any rational basis used by the court in determining the amount of loss for sentencing purposes. (The comments attributed to the presiding judge are based upon the recollection and notes of defense counsel. They cannot be quoted from a written opinion because none exists, and although defense counsel understand that the hearing before the court of appeals was recorded, that recording is unavailable to them. It is available, we feel, to this Court).

Later in the prosecutor's oral argument, the presiding judge inquired in substance whether an unsworn verbal statement by a bank officer to a bank examiner, which statement was untrue or incorrect, constituted a false entry in bank records. He received an affirmative reply, and a promise to submit authority to that effect. Although he later communicated with the court, the materials were inapposite. At the conclusion of the oral argument, the presiding judge indicated to counsel that the panel might be contacting them again. There was no subsequent contact, and, as indicated, both the affirmance of the convictions and the denial of the petition for rehearing were rendered without opinion.

As a footnote to this episode, we point out that numerous of the family members and friends of the two

petitioners were in the courtroom during the oral argument, and heard the remarks of the presiding judge. They were ecstatic from what they heard, and were dumbfounded when the convictions were affirmed without a word of explanation, either on original submission or on petition for rehearing.

Notwithstanding the judge's comments, the judgments and sentences were affirmed per curiam, without opinion, on July 13, 1994. Bolden and Peevy filed a joint suggestion for rehearing en banc on August 3, 1994 which was denied on November 14, 1994, again without opinion.

REASONS FOR GRANTING THE PETITION

This case was argued orally before the court of appeals on March 21, 1994. Three days later, that court issued its opinion in *United States v. Thorn*, 17 F.3d 325 (11th Cir. 1994). That case arose from the action of a district court in setting aside a jury verdict convicting Thorn of making a material false statement to influence a federally-insured financial institution, in violation of 18 U.S.C. § 1014. Thorn's alleged false statement was his failure to list a prior real estate mortgage on the property that secured the loan the financial institution was making to Thorn and associates. It was held that this conduct did not violate the statute. Section 1014 prohibits the same type conduct as Section 1005 of Title 18, which condemns the making of any false entry in any book, record or statement of a bank, with intent to injure or defraud such institution. The question put to the prosecutor during

oral argument of the instant case was whether an oral answer (or, we think we recall, silence) could constitute a false entry in a record of the bank. The prosecutor indicated that it could and offered to supply authorities, which were not forthcoming.

In the instant case, petitioners were accused of causing false entries to be made by not putting a letter from a lawyer threatening to sue the bank in a loan file. In addition, the evidence did not reflect that either petitioner made, directed or counseled the making of any record of the bank that was claimed to be false.

The decision in *Thorn, supra,* points out that other courts of appeal have rejected the theory of implied false statements under similar false-statement statutes. It cites *United States v. Waechter,* 771 F.2d 974 (6th Cir. 1985).

In *Waechter,* the defendant was convicted of making false statements to the Department of Housing and Urban Development. The indictment was framed under 18 U.S.C., § 1010. The allegation was that the defendant caused employees to submit multiple bids for a single property in a manner that did not reveal that he controlled all the bids, and that this constituted false statements because he intended to withdraw any bid except the lowest bid necessary to outbid his competitors and enable him to purchase a house. The court of appeals held that it found no evidence that this method involved making either express or implied statements to HUD that were false, and reversed the conviction.

Waechter even acknowledged that his method might have been a fraudulent scheme, but defended on the ground that its execution did not involve making any

false statements to HUD. The court of appeals construed § 1010 to require proof that the defendant made an assertion of fact, subject to proof or disproof, and this bidding method did not entail such. The opinion points out that Title 18, § 1001 provides a mechanism for punishing fraudulent schemes, but § 1010 does not. The opinion contains this statement: "In construing the term false statement as used in section 1010 we are mindful of the thoroughly-established principle that the conduct prohibited by a criminal statute is to be narrowly construed. See *Dowling v. United States*, 473 U.S. 207, 105 S.Ct. 3127, 3132, 87 L.Ed.2d 152 (1985); *Williams v. United States*, 458 U.S. 279, 290, 102 S.Ct. 3088, 3094, 73 L.Ed.2d 767 (1982); *United States v. Cox*, 593 F.2d 46, 47, 49 (6th Cir. 1979). We also construe § 1010 in a manner that acknowledges the distinctions between this statute and 18 U.S.C. § 1001, a distinction that the Second Circuit has recognized. See *United States v. Huber*, 603 F.2d 387, 398-99 (2d Cir. 1979), cert. denied, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980). Section 1001 prohibits the making of false statements to any department or agency of the federal government, and thus overlaps with section 1010. Section 1001, however, also proscribes the use of tricks, schemes, or devices to obscure or falsify a material fact, conduct on which section 1010 is silent. Although a false statement made to HUD is actionable under both section 1010 and section 1001, only the latter statute governs fraudulent schemes."

This Court has recognized that a false statement must be a "factual assertion". *Williams v. United States*, 458 U.S. 279 at 284, 102 S.Ct. 3088, 73 L.Ed.2d 767 (1982). Of particular significance is the fact that the opinion holds

that a check is not a factual assertion. *Williams* holds that the deposit of a bad check in a federally insured bank is not proscribed by 18 U.S.C. § 1014. Likewise, it is not proscribed by 18 U.S.C. § 1005.

The fact that the trial court allowed much testimony concerning the handling of checks of Brown in this case, and much testimony concerning an alleged Brown check-kiting scheme, makes it imperative that the written jury instructions requested by Bolden and denied by the court should have been given. These correctly stated the applicable state and federal law in the processing and handling of checks submitted to banks, and in the handling of loans, and were not otherwise covered by any oral instruction. Under all the circumstances of the trial, the petitioners were denied a fair trial by the admission of this evidence and the refusal to instruct the jury in the premises. These requested instructions dealt with matters which lay jurors would not implicitly know. They became very material because the prosecution elected to elicit testimony concerning such transactions in the bank, clearly inferring that the methodology constituted a violation of the law. The requested instructions are found at App. 40-52. The authorities which support them as correct statements of the law are cited on the respective instructions, and are accumulated here as follows: *United States v. Adamson*, 665 F.2d 649, 657 n. 20 (5th Cir. 1982) (Unit B), affirmed in part and reversed in part, 700 F.2d 953 (5th Cir. 1983) (Unit B) (*en banc*); *United States v. Gens*, 493 F.2d 216 (1st Cir. 1974); *Dixie Ag Supply, Inc. v. Nelson*, 500 So.2d 1036, 1040 (Ala. 1986); *In Re Smith*, 29 Bankr. 690, 692 (W.D. Mo. 1983); *United States v. Gallatin Livestock Auction*, 589 F.2d 353 (8th Cir. 1978); and *Code of Alabama*

1975, § 7-9-306(1), § 7-9-312(3)(a); and § 7-4-213(1)(a), 213(1)(c), 109(b), 109(e), 303(2); and § 7-9-306(1)&(2).

The sentencing method employed by the district court was fatally flawed because it found a "loss" where none existed. Equally flawed was the district court's finding of "victims" or "losers" when no person or entity lost at the hands of these petitioners. The sentencing guidelines must operate on a foundation based on reality rather than on speculation by the district court. Even the presiding judge of the court of appeals recognized the district court's failure to employ a rational basis in determining the amount of loss for sentencing purposes.

"Loss" as used in U.S.S.G. § 2F1.1, has been defined consistently as the greater of the value of the property the defendant actually took or the property he intended to take. *U.S. v. Menichino*, 989 F.2d 438 (11th Cir. 1993). Throughout this eleven day trial, despite the testimony of 21 witnesses for the prosecution, no evidence was presented that Bolden or Peevy took any property belonging to the bank or bank customers. There was no evidence presented that either Bolden or Peevy intended to take any property or to cause a loss. Nevertheless, the district court announced for the first time at the sentencing hearing that United Bank was a victim of the crimes of which Bolden and Peevy were convicted.

U.S.S.G. § 2F1.1, comment. (n.3) defines "victim" for offenses involving fraud and deceit as "the person or entity from which the funds are to come directly." United Bank, not Bolden or Peevy, made the decision to forgive the customers' notes and take an assignment of their

rights. The bank itself was the actor, not Bolden or Peevy, and as such, it cannot defraud itself.

Defense counsel argued that the "loss" amount, if it exists at all, should be offset by whatever security, collateral or assignment a customer gave to the bank in return for the write-off of a loan. However, the district court continued on its flawed course by stating "**It's not going to make any difference.**" (R.15-35) [Emphasis supplied].

In a loan application case involving misrepresentation of assets, the court of appeals held that the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lender could recover from the collateral. *U.S. v. Menichino*, 989 F.2d 438, 441 (11th Cir. 1993). Cited is *U.S. v. Baum*, 974 F.2d 496 (4th Cir. 1992), which held that the potential consequences of default, rather than the amount of the loan, best measures the "loss" to which the lending institution was exposed. Further, the value of the security interest should be deducted from the amount of the loan in determining "loss" for purposes of enhancing a defendant's sentence. *Baum* at 499. The court of appeals in *Menichino* also cites *U.S. v. Smith*, 951 F.2d 1164 (10th Cir. 1991), which held that the actual loss should be measured by the net value, not the gross value, of what was taken. In *Smith*, there was no evidence of any actual loss in the record, that is, the government did not prove that the defendant "took" any property through his misrepresentations. Although Smith did receive the proceeds of the loans, he delivered to the lender something in return: the security interest in property and the promises of the individual borrowers to repay the loans. "Under the

Guidelines, net loss must reflect the value of the property securing the loans." *Smith* at 1167.

If we use the approach endorsed by the court of appeals in *Menichino*, certainly some offset of the loss amount must be made for the property retained by the bank. Regarding the cattle customers, United Bank wrote off the customers' loans *in return for* a release and an assignment of the customers' rights in the collateral. They gave United Bank something of value: the opportunity to pursue the proceeds of the sale of the collateral and the right to those proceeds when found. (R.10-1536) They also gave up the right to assert causes of action against the bank which might have involved monetary claims far exceeding the balance of their forgiven loans.

The final point raised in this petition relates to the supervisory power and responsibility of this Court over the courts of appeal, and, in fact, the supervisory responsibility of those courts over lower courts.

The statements made by the presiding judge to counsel for the prosecution were made with considerable force and intensity, and would, we submit, have convinced even the most sophisticated court watcher that this judge was deeply troubled about several aspects of the two convictions, and that something was very wrong with the conduct and rulings of the court below.

The aftermath is even more troubling. Oral argument was held before the court of appeals on March 21, 1994. Almost four months later, the convictions were affirmed without opinion. The joint petition for rehearing was denied on November 14, 1994, again without opinion. The petition for rehearing urged the court to write an

opinion, to assist in the focus of a petition for certiorari to this Court.

It strikes petitioners as obligatory that some word should have been spoken by the court to explain a unanimous affirmance, where the presiding judge had been so strong in his adverse comments at the outset, and neither of the other two panel members had expressed any word of disagreement. The lay perception of justice in this scenario has been profoundly shaken. The pronouncements made in open court were unique in the experience of counsel for the petitioners, as were the two mute affirmances. Either much less should have been said by the court at the outset, or much more should have been said at the conclusion.

Petitioners admittedly have found no cases on all fours with this aspect of the instant case, but their view is that this Court should feel impelled, in the interest of upholding the honor of the administration of justice, to demand more of the trial court and the court of appeals in this case. The philosophy for which petitioners contend has been articulated by this Court on many occasions, and perhaps nowhere more succinctly or with greater force than in *Communist Party of U.S.A. v. Subversive Activities Control Board*, 351 U.S. 115, 100 L.Ed. 1003, 76 S.Ct. 663 (1956), where the opinion states at 100 L.Ed. 1009:

> "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. *See McNabb v. United States,*

> 318 U.S. 332, 87 L.Ed. 819, 63 S.Ct. 608. Therefore, fastidious regard for the honor of the administration of justice requires the court to make certain that doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted."

Petitioners and their counsel are of the view that for the doing of justice to be made manifest in this case, the court of appeals should be required to make this Court privy to the words spoken in oral argument, and to the tone in which these words were spoken, and having done so that this Court should determine whether the doing of justice in this case can be made manifest without the court below explaining its views.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-6516

D.C. Docket No. CR 93-00001-AH

(Filed July 13, 1994)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRED PEEVY; RAY BOLDEN,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Alabama

(July 13, 1994)

Before EDMONDSON, Circuit Judge, JOHNSON, Senior Circuit Judge, and PITTMAN*, Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.

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* Honorable Virgil Pittman, Senior United States District Judge for the Southern District of Alabama, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-6516

(Filed Nov. 14, 1994)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRED PEEVY; RAY BOLDEN,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: EDMONDSON, Circuit Judge, JOHNSON, Senior Circuit Judge, and PITTMAN*, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

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* Honorable Virgil Pittman, Senior Unites [sic] States District Judge for the Southern District of Alabama, sitting by designation.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN District of ALABAMA

UNITED STATES OF AMERICA

V.

RAY BOLDEN

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 93-00001

L. DREW REDDEN
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____.

[x] was found guilty on count(s) 1, 2, 3, 4, 5 & 6 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC, 371			1
18 USC, 656 & 2			2
18 USC, 1005 & 2			3,4,5 & 6

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[ ] Count(s) ___ (is) (are) dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $300.00 , for count(s) 1, 2, 3, 4, 5 & 6 , which shall be due [x] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are full paid.

Defendant's Soc. Sec. No.:
423-38-3182

Defendant's Date of Birth:
9/9/31

Defendant's
Mailing Address:

PO Box 755

Atmore, Alabama
36504-0755

Defendant's Residence
Address:

July 16, 1993
Date of Imposition
of Sentence

/s/ Alex T. Howard, Jr.
Signature of
Judicial Officer

ALEX T. HOWARD, JR.,
U.S. DISTRICT JUDGE
Name & Title of
Judicial Officer

7/16/93
Date

Defendant: RAY BOLDEN
Case Number: 93-00001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 41 months without parole as to each of counts 1, 2, 3, 4, 5 and 6, with all terms of imprisonment to be served concurrently.

[x] The court makes the following recommendations to the Bureau of Prisons:

The defendant be incarcerated in a minimum security institution.

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

[ ] at _____ p.m. on _____ .

[ ] as notified by the United States marshal.

[x] The defendant shall surrender for service of sentence at the institution designated by the Bureau of prisons,

[ ] before 2 p.m. on _____

[x] as notified by the United States marshal.

[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____
to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: RAY BOLDEN
Case Number: 93-00001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS on count 1 and FIVE (5) YEARS on counts 2, 3, 4, 5 and 6, with all terms of supervised release to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of

supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[x] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[x] The defendant shall not possess a firearm of destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime, in addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment,

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the

probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement,

14) the defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon;

15) the defendant shall participate in a program of testing and treatment for drug abuse, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Officer.

Defendant: RAY BOLDEN
Case Number: 93-00001

RESTITUTION AND FORFEITURE

RESTITUTION

[x] The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
United Bank of Atmore Atmore, Alabama	$1,558,471.00
** Preston Barnett Barnett Construction, Inc. PO Box 36504 Atmore, Alabama 36504	568,000.00

** If any of the stock in the Bank of Atmore that is being held by the Bank of Atmore as collateral for Preston Barnett is returned to Preston Barnett, the value of said stock is to be reduced from the amount of restitution owed by this defendant to Preston Barnett.

Said restitution is due immediately to the extent that assets are reasonably available to the defendant and payment is to be made payable to the U.S. Department of Justice.

Any restitution balance remaining at the time of the commencement of supervised release/probation shall be paid as a condition of supervised release/probation on terms determined by the U.S. Probation Officer.

Said restitution shall be collected and disbursed by the United States Attorney on a pro rata basis (multi-victim restitution cases only).

Payment of restitution are to be made to:

[ ] the United States Attorney for transfer to the payee(s).

[x] the payee(s).

[ ] Clerk of Courts: _____.

Restitution shall be paid:

[x] in full immediately.

[ ] in full not later than _____.

[ ] in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

[x] in installments according to the following schedule of payments:

To be established by the Probation Office.

The defendant is to be jointly and severally liable with co-defendant Fred Peevy for the payment of this restitution.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

[ ] The defendant is ordered to forfeit the following property to the United States:

_____

UNITED STATES DISTRICT COURT

SOUTHERN District of ALABAMA

UNITED STATES OF AMERICA

V.

FRED PEEVY

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)

Case Number: 93-00001

WILLIAM KIMBROUGH
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____.

[x] was found guilty on count(s) 1, 2, 3, 4, 5 & 6 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC, 371			1
18 USC, 656 & 2			2
18 USC, 1005 & 2			3,4,5&6

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[ ] Count(s) ___ (is) (are) dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $300.00 , for count(s) 1, 2, 3, 4, 5 & 6 , which shall be due [x] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
423-58-6722

Defendant's Date of Birth:
12/6/45

Defendant's
Mailing Address:

PO Box 240

Atmore, Alabama
36504

Defendant's Residence
Address:

July 16, 1993
Date of Imposition
of Sentence

/s/ Alex T. Howard, Jr.
Signature of
Judicial Officer
ALEX T. HOWARD, JR.,
U.S. DISTRICT JUDGE
Name & Title of
Judicial Officer

7/16/93
Date

Defendant: FRED PEEVY
Case Number: 93-00001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 41 months without parole on each of counts 1, 2, 3, 4, 5 and 6, with all terms of imprisonment to be served concurrently.

[x] The court makes the following recommendations to the Bureau of Prisons:

The defendant be incarcerated in a minimum security institution.

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

[ ] _____ a.m.
[ ] at _____ p.m. on _____.

[x] The defendant shall surrender for service of sentence at the institution designated by the Bureau of prisons,

[ ] before 2 p.m. on _____

[x] as notified by the United States marshal.

[x] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: FRED PEEVY
Case Number: 93-00001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS on count 1 and FIVE (5) YEARS on counts 2, 3, 4, 5 and 6, with all terms of supervised release to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of

supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[x] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[ ] The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime, in addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment.

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the

probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) the defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon;

15) the defendant shall participate in a program of testing and treatment for drug abuse, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Officer.

Defendant: FRED PEEVY
Case Number: 93-00001

RESTITUTION AND FORFEITURE

RESTITUTION

[x] The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
United Bank of Atmore Atmore, Alabama	$1,558,471.00
** Preston Barnett Barnett Construction, Inc. PO Box 36504 Atmore, Alabama 36504	568,000.00

** If any of the stock in the Bank of Atmore that is being held by the Bank of Atmore as collateral for Preston Barnett is returned to Preston Barnett, the value of said stock is to be reduced from the amount of restitution owed by this defendant to Preston Barnett.

Said restitution is due immediately to the extent that assets are reasonably available to the defendant and payment is to be made payable to the U.S. Department of Justice.

Any restitution balance remaining at the time of the commencement of supervised release/probation shall be paid as a condition of supervised release/probation on terms determined by the U.S. Probation Officer.

Said restitution shall be collected and disbursed by the United States Attorney on a pro rata basis (multi-victim restitution cases only).

Payment of restitution are to be made to:

[ ] the United States Attorney for transfer to the payee(s).

[x] the payee(s).

[ ] Clerk of Courts: _____ .

Restitution shall be paid:

[x] in full immediately.

[ ] in full not later than _____ .

[ ] in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

[x] in installments according to the following schedule of payments:

To be established by the Probation Office.

The defendant is to be jointly and severally liable with co-defendant Ray Bolden for the payment of this restitution.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

[ ] The defendant is ordered to forfeit the following property to the United States:

_____

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

(As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.)

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be find not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 656. Theft, embezzlement, or misapplication by bank officer or employee

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve Bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act, or a receiver of a national bank, insured bank, branch, agency, or organization or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank, branch, agency, or organization or holding company or any moneys, funds, assets or securities intrusted to the custody or care of such bank, branch, agency, or organization, or holding company or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; "insured

bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation. For purposes of this section, the term "depository institution holding company" has the meaning given such term in section 3 of the Federal Deposit Insurance Act; and the term "branch or agency of a foreign bank" means a branch or agency described in section 20(9) of this title.

(As amended Aug. 9, 1989, Pub.L. 101-73, Title IX, § 961(b), 103 Stat. 499, Nov. 29, 1990, Pub.L. 101-647, Title XXV, §§ 2504(b), 2595(a)(1), 2597(f), 104 Stat. 4861, 4906, 4909.)

§ 1005. Bank entries, reports and transactions

Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act, without authority from the directors of such bank, branch, agency, or organization or company, issues or puts in circulation any notes of such bank, branch, agency, or organization or company; or

Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or

Whoever makes any false entry in any book, report, or statement of such bank, company, branch, agency, or organization with intent to injure or defraud such bank, company, branch, agency, or organization, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, company, branch, agency, or organization, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, company, branch, agency, or organization, or the Board of Governors of the Federal Reserve System;

Whoever with intent to defraud the United States or any agency thereof, or any financial institution referred to in this section, participates or shares in or receives

(directly or indirectly) any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such financial institution –

Shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank or trust company, which has become a member of one of the Federal Reserve banks; "insured bank" includes any state bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation. For purposes of this section, the term "depository institution holding company" has the meaning given such term in section 3(w)(1) of the Federal Deposit Insurance Act; and the term "branch or agency of a foreign bank" means a branch or agency described in section 20(9) of this title.

(As amended Aug. 9, 1989, Pub.L. 101-73, Title IX, § 961(d), 103 Stat. 499; Nov. 29, 1990, Pub.L. 101-647, Title XXV, §§ 2504(d), 2595(a)(3), 2597(h), 104 Stat. 4861, 4907, 4910.)

PART F – OFFENSES INVOLVING FRAUD OR DECEIT

§2F1.1 Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level: **6**

(b) Specific Offense Characteristics

(1) If the loss exceeded $2,000, increase the offense level as follows:

	Loss (Apply the Greatest)	Increase in Level
(A)	$2,000 or less	no increase
(B)	More than $2,000	add **1**
(C)	More than $5,000	add **2**
(D)	More than $10,000	add **3**
(E)	More than $20,000	add **4**
(F)	More than $40,000	add **5**
(G)	More than $70,000	add **6**
(H)	More than $120,000	add **7**
(I)	More than $200,000	add **8**
(J)	More than $350,000	add **9**
(K)	More than $500,000	add **10**
(L)	More than $800,000	add **11**
(M)	More than $1,500,000	add **12**
(N)	More than $2,500,000	add **13**
(O)	More than $5,000,000	add **14**
(P)	More than $10,000,000	add **15**
(Q)	More than $20,000,000	add **16**
(R)	More than $40,000,000	add **17**
(S)	More than $80,000,000	add **18**

(2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by **2** levels.

(3) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

(4) If the offense involved the conscious or reckless risk of serious bodily injury, increase by **2** levels. If the resulting offense level is less than level **13**, increase to level **13**.

(5) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level **12**, increase to level **12**.

(6) If the offense –

(A) substantially jeopardized the safety and soundness of a financial institution; or

(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,

increase by **4** levels. If the resulting offense level is less than level **24**, increase to level **24**.

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78d, 78j, 78ff, 80b-6, 1644; 18 U.S.C. §§ 225, 285-289, 471-473, 500, 510, 659, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1031, 1341-1344, 2314, 2315. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *The adjustments in §2F1.1(b)(3) are alternative rather than cumulative. If in a particular case, however, both of the enumerated factors applied, an upward departure might be warranted.*

2. *"More than minimal planning" (subsection (b)(2)(A)) is defined in the Commentary to §1B1.1 (Application Instructions).*

3. *"Scheme to defraud more than one victim," as used in subsection (b)(2)(B), refers to a design or plan to obtain something of value from more than one person. In this context, "victim" refers to the person or entity from which the funds are to come directly. Thus, a wire fraud in which a single telephone call was made to three distinct individuals to get each of them to invest in a pyramid scheme would involve a scheme to defraud more than one victim, but passing a fraudulently endorsed check would not, even though the maker, payee and/or payor all might be considered victims for other purposes, such as restitution.*

4. *Subsection (b)(3)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine*

relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.

5. *Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in §2J1.7 (Offense Committed While on Release)) or a violation of probation (addressed in §4A1.1 (Criminal History Category)).*

6. *Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).*

7. *Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred. Consistent with the provisions of §2X1.1 (Attempt, Solicitation or Conspiracy), if an intended loss that the defendant was*

attempting to inflict can be determined, this figure will be used if it is greater than the actual loss. Frequently, loss in a fraud case will be the same as in a theft case. For example, if the fraud consisted of selling or attempting to sell $40,000 in worthless securities, or representing that a forged check for $40,000 was genuine, the loss would be $40,000.

There are, however, instances where additional factors are to be considered in determining the loss or intended loss:

(a) Fraud Involving Misrepresentation of the Value of an Item or Product Substitution

A fraud may involve the misrepresentation of the value of an item that does have some value (in contrast to an item that is worthless). Where, for example, a defendant fraudulently represents that stock is worth $40,000 and the stock is worth only $10,000, the loss is the amount by which the stock was overvalued (i.e., $30,000). In a case involving a misrepresentation concerning the quality of a consumer product, the loss is the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received.

(b) Fraudulent Loan Application and Contract Procurement Cases

In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan. However, where the intended loss is

greater than the actual loss, the intended loss is to be used.

In some cases, the loss determined above may significantly understate or overstate the seriousness of the defendant's conduct. For example, where the defendant substantially understated his debts to obtain a loan, which he nevertheless repaid, the loss determined above (zero loss) will tend not to reflect adequately the risk of loss created by the defendant's conduct. Conversely, a defendant may understate his debts to a limited degree to obtain a loan (e.g., to expand a grain export business), which he genuinely expected to repay and for which he would have qualified at a higher interest rate had he made truthful disclosure, but he is unable to repay the loan because of some unforeseen event (e.g., an embargo imposed on grain exports) which would have caused a default in any event. In such a case, the loss determined above may overstate the seriousness of the defendant's conduct. Where the loss determined above significantly understates or overstates the seriousness of the defendant's conduct, an upward or downward departure may be warranted.

(c) *Consequential Damages in Procurement Fraud and Product Substitution Cases*

In contrast to other types of cases, loss in a procurement fraud or product substitution case includes not only direct damages, but also consequential damages that were reasonably foreseeable. For example, in a case involving a defense product substitution offense, the loss includes the government's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting the product so that it can be used for its intended purpose, plus the government's reasonably foreseeable cost of rectifying the actual or

potential disruption to government operations caused by the product substitution. Similarly, in the case of fraud affecting a defense contract award, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable. Inclusion of reasonably foreseeable consequential damages directly in the calculation of loss in procurement fraud and product substitution cases reflects that such damages frequently are substantial in such cases.

(d) Diversion of Government Program Benefits

In a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses.

(e) Davis-Bacon Act Cases

In a case involving a Davis-Bacon Act violation (a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the loss is the difference between the legally required and actual wages paid.

8. *For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss.*

9. *In the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a*

larger, attempted fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to §2X1.1.

10. *In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:*

    (a) a primary objective of the fraud was non-monetary; or the fraud caused or risked reasonably foreseeable, substantial non-monetary harm;

    (b) false statements were made for the purpose of facilitating some other crime;

    (c) the offense caused reasonably foreseeable, physical or psychological harm or severe emotional trauma;

    (d) the offense endangered national security or military readiness;

    (e) the offense caused a loss of confidence in an important institution;

    (f) the offense involved the knowing endangerment of the solvency of one or more victims.

    In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it. In such cases, a downward departure may be warranted.

11. *Offenses involving fraudulent identification documents and access devices, in violation of 18 U.S.C. §§ 1028 and*

1029, are also covered by this guideline. Where the primary purpose of the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status, apply §2L2.1 or §2L2.2, as appropriate, rather than §2F1.1. In the case of an offense involving false identification documents or access devices, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.

12. *If the fraud exploited vulnerable victims, an enhancement will apply. See §3A1.1 (Vulnerable Victim).*

13. *Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 would be more apt, and false statements to a customs officer, for which §2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. Where the indictment or information setting forth the count of conviction (or a stipulation as described in §1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than §2F1.1. Otherwise, in such cases, §2F1.1 is to be applied, but a departure from the guidelines may be considered.*

14. *"Financial institution," as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 20, 656, 657, 1005-1007, and 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings*

(building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

15. *An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.*

16. *"The defendant derived more than $1,000,000 in gross receipts from the offense," as used in subsection (b)(6)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000. "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).*

17. *If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the*

offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise."

18. *If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved "more than minimal planning."*

Background: This guideline is designed to apply to a wide variety of fraud cases. The statutory maximum term of imprisonment for most such offenses is five years. The guideline does not link offense characteristics to specific code sections. Because federal fraud statutes are so broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity.

Empirical analyses of pre-guidelines practice showed that the most important factors that determined sentence length were the amount of loss and whether the offense was an isolated crime of opportunity or was sophisticated or repeated. Accordingly, although they are imperfect, these are the primary factors upon which the guideline has been based.

The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents of fraud are indicative of an intention and potential to do considerable harm. In pre-guidelines practice, this factor had a significant impact, especially in frauds involving small losses. Accordingly, the guideline specifies a 2-level enhancement when this factor is present.

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. However, defendants who exploit victims' charitable impulses or trust in government create particular social harm. A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

Offenses that involve the use of transactions or accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum level of 12 is provided for these offenses.

Subsection (b)(6)(A) implements, in a broader form, the instruction to the Commission in Section 961(m) of Public Law 101-73.

Subsection (b)(6)(B) implements the instruction to the Commission in Section 2507 of Public Law 101-647.

DEFENDANT BOLDEN'S REQUESTED JURY CHARGE NO. 1

INTENT – 18 U.S.C. SECTION 656

I charge you that if you find the defendant extended credit to a named borrower who was financially able at the time of the loan to repay the loan, knew that it was obligated to repay the loan, and that no assurances were given to it that the bank not look to it to repay the loan, then in that event, you would be authorize [sic] to acquit the defendant of misapplication of bank funds.

I charge you that if you find the named borrower is both financially capable of repaying the loan and that the named borrower fully understands that it is his responsibility to repay the loan, such a loan cannot – absent other circumstances – properly be characterized as a sham or dummy transaction, even if bank officials knew that the named borrower would pay the proceeds over to a third party. In this situation, the bank official has simply granted a loan to a financially capable party, which is precisely what a bank official may do.

Source: This precise charge was given and affirmed in *United States v. Adamson*, 665 F.2d 649, 657 n. 20 (5th Cir. 1982) (Unit B). Although the case went *en banc* and was reversed in part on other questions with respect to the intent charge, *United States v. Adamson*, 700 F.2d 953 (5th Cir. 1983) (*en banc*) (Unit B), that reversal did not in any way affect the validity of the charge quoted in note 20 of the panel opinion, which is a direct

quote out of *United States v. Gens*, 493 F.2d 216 (1st Cir. 1974).

GIVEN: __
REFUSAL: ✓

DEFENDANT BOLDEN'S REQUESTED JURY CHARGE NO. 6

ALLEGED FALSE ENTRIES:
NAME OF TRUE BORROWER
[COUNTS FIVE AND SIX]

The government charges that the defendants Bolden and Peevy made false entries in bank records, naming the wrong borrowers, in two specific situations.

First, in Count Five, the government charges that the defendants Bolden and Peevy made or caused to be made false entries in the records of the bank, when the bank lent $300,000 to Barnett Construction, Inc., and showed on bank records that this was a loan to Barnett Construction, Inc. The prosecution charges that the records of the bank were false, because the loan, while shown on bank records as a loan to Barnett Construction, Inc., was actually a loan to W.M. Brown, the person to whom Barnett Construction, Inc. lent the same money on the same day.

Second, in Count Six the government charges that defendants Bolden and Peevy made or caused to be made false entries in bank records, when the bank made a loan for $368,000 to Preston Barnett. The government charges that the records were false in that, while the bank records showed that the loan was to Preston Barnett, the loan was actually one made to W.M. Brown, on the theory that when the bank lent money to Barnett, and Barnett bought cattle from B&J Cattle Company, the money ultimately went to W.M. Brown.

The theory of both Counts is that Preston Barnett and Barnett Construction, Inc. were not the borrowers, but

instead, the "true beneficiaries" (which is what the government calls it) were W.M. Brown and the W.M. Brown Feed Yard.

The Court charges the Jury that, where the named debtor is both financially capable and fully understands that it is his responsibility to repay the loan, a loan to him cannot properly be characterized as sham or dummy, even if bank officials knew that he would turn the proceeds over to a third party.

In this case, if you the Jury find that Barnett Construction, Inc. and Preston Barnett were both financially capable and fully understood that it was their responsibility to repay the loans, then a loan to them cannot properly be characterized as a sham loan or dummy loan, even if defendants Ray Bolden and Fred Peevy knew that Preston Barnett and/or Barnett Construction, Inc. would immediately turn the loan proceeds over to W.M. Brown, or the W.M. Brown Feed Yard.

Source: *United States v. Gens*, 493 F.2d 216, 222 (1st Cir. 1974) *Accord, United States v. Adamson*, 665 F.2d 649, 657 n. 20 (5th Cir. 1982) (Unit B), reversed on other grounds *en banc*, 700 F.2d 953 (5th Cir. 1983) (Unit B);

Decisions of Unit B of the former Fifth Circuit are binding precedent regardless of the data issued. *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982); *Stafford v. Muscogee County Board of Education, Muscogee County Board. of Education*, 688 F.2d 1383, 1387 n. 1 (11th Cir. 1983).

GIVEN: __
REFUSED: ✓

DEFENDANT BOLDEN'S REQUESTED JURY CHARGE NO. 7

SECURITY INTEREST IN PROCEEDS

There has been some testimony and some discussion about this case dealing with the renewal of certain loans at a time when there may or may not have been certain cattle collateral which had previously been at the W.M. Brown Feed Yard.

You may be required to decide whether or not the bank was getting anything of *value* when it did that.

The evidence showed that the promissory note or "loan" gave a security interest in cattle, but also gave a security interest in all "accessions" and "all proceeds and products from the property".[1]

Under Alabama law, if that loan were renewed with the same security interest, then the Court charges the Jury that United Bank would also have a security interest in this collateral:

1. The cattle, if they could be found;

2. The proceeds of the cattle, which would include whatever was received from the sale, exchange, collection, or disposition of the cattle or proceeds;[2]

3. Insurance proceeds, in some cases;[3]

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[1] United Bank Promissory Note, Exhibit ____.

[2] ALA. CODE 7-9-306(1); *Dixie Ag Supply, Inc. v. Nelson*, 500 So.2d 1036, 1040 (Ala. 1986).

[3] *Id.*

4. In some cases, the proceeds of a possible lawsuit against any person who bought or sold or took the cattle.

Source: [As cited]

GIVEN:
REFUSED: ✓

DEFENDANT BOLDEN'S REQUESTED JURY CHARGE NO. 8

DISBURSEMENT OF CUSTOMER'S CATTLE LOAN TO CUSTOMER AND BILL BROWN WHEN BILL BROWN HAD NOT YET BOUGHT THE CATTLE FOR THE CUSTOMER

The prosecution has suggested in this case on several occasions that when the bank disbursed a customer's cattle loan jointly to the customer and to the W.M. Brown Feed Yard, before the W.M. Brown Feed Yard had purchased the cattle for the customer, that the procedure was somehow illegal or wrong or improper.

That is not the case.

Under Alabama law, and under the *Uniform Commercial Code* adopted not only by Alabama but by every state other than Louisiana, this procedure is perfectly legal.

The *Uniform Commercial Code* provides that a lending institution or bank may lend money to someone who wishes to buy something, even before it is actually bought, and the bank may take a security interest in what is bought.

When the bank lends the money for the purchase of goods, then the bank has what Alabama law calls a "purchase money security interest" and that security interest is perfected later, at the time the borrower gets possession of the goods.[1] Under the *Uniform Commercial Code*, then, the bank would have a valid and perfected security interest in those cattle, even if the cattle were

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[1] ALA. CODE § 7-9-312(3)(a).

bought with the money much later, for example, even two months later.

This would be perfectly legal under Alabama law.

Source: *In Re Smith*, 29 Bankr. 690, 692 (W.D. Mo. 1983), in which the Court held that under Article 9 of the U.C.C.:

> The evidence shows that FmHA filed its financing statement prior to the funds being paid to debtor. Debtor used a substantial part of the money to purchase pigs and cattle. The purchases were made within two months of the advance. The purchase money security interest therefore was perfected when debtors received the collateral.

GIVEN: __
REFUSED: ✓

DEFENDANT BOLDEN'S REQUESTED JURY CHARGE NO. 10

FINAL PAYMENT OF A CHECK

You have heard testimony about "overdraft". An "overdraft" does not occur unless a bank finally *pays* a check which is bigger than the amount in the account.

I charge you that under Alabama law "final payment" of a check does not occur until *either* (1) the bank cashes the check,[1] or (2) makes a settlement for the check with the prior bank that sent the check for collection,[2] or actually completes the "process of posting" the check in the records.[3]

The bank's "process of posting" is not complete until it has had a chance to make sure that there is enough money in the account[4] and correct or reverse any entry or erroneous action.[5]

So, under Alabama law the check is not "paid" by the bank until all those bookkeeping steps have been finished. Just because the computer printout from the night before shows a negative balance in the account does not make the check an "overdraft"; the bank gets to complete the "process of posting" the next day,[6] when it can *return* the check. If the bank returns the check for "not sufficient

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[1] ALA. CODE § 7-4-213(1)(a).

[2] *Id.* at § 7-4-213(1)(c).

[3] *Id.* at § 7-4-213(1)(c).

[4] *Id.* at § 7-4-109(b).

[5] *Id.* at 7-4-109(e).

[6] *Id.*

funds", then under Alabama law, I charge you that the bank has not "paid" an "overdraft".

Source: [as cited]

GIVEN: __
REFUSED: ✓

DEFENDANT BOLDEN'S REQUESTED JURY CHARGE NO. 13

ORDER IN WHICH BANK MAY CHARGE ITEMS AGAINST BANK ACCOUNT

Under Alabama law, and subject to certain exceptions which do not pertain to this case, if more checks are written from a bank account than the bank account has money, then those checks may be paid or charged to the account of its customer in any order convenient to the bank.

The bank, under Alabama law, obviously has the right to pay checks for which the bank itself may be liable ahead of those for which it is not liable. What this means is that under Alabama law it would be entirely legal and proper for the bank to pay checks made out to itself or to any of its customers having loans, before any other checks.

The *Uniform Commercial Code* as adopted in Alabama does not require any bank to take the checks on any kind of "first come, first served basis" or to take the largest ones first, or the oldest ones first, or anything else. The bank can pay them in any order it may decide, for its own convenience.

Source: ALA. CODE § 7-4-303(2), comment 6 (last sentence)

GIVEN: __
REFUSED: ✓

DEFENDANT BOLDEN'S REQUESTED JURY CHARGE NO. 20

BANK'S SECURITY INTEREST IN PROCEEDS OF CATTLE CONTINUES EVEN IF CATTLE GONE, AND CAN BE FOLLOWED TO OTHER FUNDS AND ASSETS

The government has charged in Count One (the conspiracy Count), certain "overt acts", or acts which the government claims Mr. Bolden and Mr. Peevy did in furtherance of the conspiracy.

In paragraphs [or alleged overt acts] 3,4,5, and 9, the government charges that Mr. Peevy approached Marietta Downer, James White, Judy Linam and Marshall Ward, about renewing their cattle loans. The government charges that Mr. Peevy did this "even though PEEVY knew the cattle listed as collateral on the note were fictitious".

I charge you that under the undisputed evidence in this case, the promissory notes signed by Marietta Downer, James White, Judy Linam and Marshall Ward gave to United Bank a security interest in the *cattle*, but *also* in "all proceeds and products from the property".

I further charge you that if those cattle *ever* existed, after the signing of the original notes, then even if those cattle were *gone* from the W.M. Brown Fee Yard at the time of the renewal of those loans and notes, and even if those cattle had been *slaughtered* and sold, then under the law the security interest of United Bank would *continue* in the following things which may be of value, perhaps equivalent value:

1. anything of value (money or otherwise) received from the cattle, if they had been sold;[1]

2. any insurance which might have been payable to United Bank or the cattle customer on account of the cattle;[2]

3. the proceeds of some civil claim or lawsuit against other people or parties, for example, a person whose negligence or wrong led to the loss or death of the cattle;[3]

4. the proceeds of a lawsuit against parties which bought the cattle;[4]

5. the proceeds of a lawsuit against an auction house which handled the sale of the cattle.[5]

Source: [as cited]

GIVEN: __
REFUSED: ✓

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[1] ALA. CODE § 7-9-306(1)&(2).

[2] *Id.* at § 7-9-306(1).

[3] *In re Stone*, 52 BR 305, 41 UCCR 1465 (W.D. Ky. 1985); *In re Tevrito*, 32 BR 377, 36 UCCR 1762 (E.D. N.Y. 1983).

[4] *North Central Kansas PCA v. Boese*, 24 UCCR 759, 577 P.2d 824 (1978).

[5] *United States v. Gallatin Livestock Auction*, 589 F.2d 353 (8th Cir. 1978), *aff'd* 448 F.Supp. 616 (W.D. Mo. 1978).